SUPREME COURT OF THE UNITED STATES

ALEXZENE HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND TO JAMES EDWARD SMITH *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 89-7838. Decided October 9, 1990

The motion of Chris Lonchar Kellogg for leave to intervene is denied. The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, concurring.

I agree with JUSTICE STEVENS that the issue raised in this petition is important and merits resolution by this Court. I write to express my frustration with the Court's failure to avail itself of the ordinary procedural mechanisms that would have permitted us to resolve that issue in *this* case.

It is already a matter of public record that four Members of this Court voted to grant certiorari before petitioner was executed. See *Hamilton* v. *Texas*, 497 U. S. —— (1990) (Brennan, J., dissenting from denial of application for stay). According to established practice, this fact should have triggered a fifth vote to grant petitioner's application for a stay of his execution.* Indeed, this result flows naturally from the

*See *Autry* v. *Estelle*, 464 U. S. 1, 2 (1983) *(per curiam)* ("Had applicant convinced four Members of the Court that certiorari would be granted on any of his claims, a stay would issue"); *Darden* v. *Wainwright*, 473 U. S. 928, 928–929 (1985) (Powell, J., concurring in granting of stay); *Straight* v. *Wainwright*, 476 U. S. 1132, 1133, n. 2 (1986) (Powell, J., concurring in denial of stay, joined by Burger, C. J., REHNQUIST, and O'CONNOR, JJ.) (noting that "the Court has ordinarily stayed executions when four Members have voted to *grant* certiorari"); *id.*, at 1134–1135 (Brennan, J., dissenting from denial of stay, joined by MARSHALL and BLACKMUN, JJ.) ("[W]hen four vote to grant certiorari in a capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting certiorari will nonetheless vote to stay; this is so that the 'Rule of Four' will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits").

standard by which we evaluate stay applications, a central component of which is "whether four Justices are *likely* to vote to grant certiorari." *Coleman* v. *Paccar*, 424 U. S. 1301, 1302 (1976) (REHNQUIST, J., in chambers) (emphasis added); see also *Maggio* v. *Williams*, 464 U. S. 46, 48 (1983) *(per curiam)* (same).

In my view, the Court's willingness in this case to dispense with the procedures that it ordinarily employs to preserve its jurisdiction only continues the distressing rollback of the legal safeguards traditionally afforded. Compare *Boyde* v. *California*, 494 U. S. ——, —— (1990) (MARSHALL, J., dissenting) (criticizing diminution in standard used to assess unconstitutional jury instructions in capital cases); *Barefoot* v. *Estelle*, 463 U. S. 880, 912–914 (1983) (MARSHALL, J., dissenting) (criticizing Court's endorsement of summary appellate procedures in capital cases); *Autry* v. *McKaskle*, 465 U. S. 1085, 1085–1086 (1984) (MARSHALL, J., dissenting from denial of certiorari) (criticizing expedited consideration of petitions for certiorari in capital cases).